Public Prosecutor v Ismail bin Abd Wahab

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-09–167–05 OF 2012
APANDI ALI, LINTON ALBERT AND HAMID SULTAN JJCA
26 APRIL 2013

Criminal Procedure — Appeal — Notice of appeal — Delay in filing of notice by prosecution — Whether fax copy of the notice would suffice to satisfy statutory requirements — Whether courts had discretion to condone delay in filing of notice — Whether discretion ought to be exercised in present case — Whether discretion could be exercised to defeat constitutional provision — Criminal Procedure Code ss 307 & 310 — Courts of Judicature Act 1964 ss 51 & 56 — Rules of the Court of Appeal 1994 rr 58, 59, 60, 61, 62, 63 & 64

This was an appeal against a decision of the High Court that was delivered on 20 April 2012. The respondent raised the preliminary objection that the notice of appeal was not filed within time. The notice of appeal, which ought to have been filed on 3 May 2012, was only filed on 9 May 2012. The respondent also took objection to the fact that there was no application to condone the delay, when the appeal proper came up for hearing. Further, the respondent also argued that the delay could not be condoned on the day of the hearing. In response the deputy public prosecutor ('the appellant') submitted that it had not filed the notice of appeal late and that the court had received a fax copy of the notice of appeal on 2 May 2012. In support of this submission the appellant relied on the case of *Public Prosecutor v Jawan ak Empaling & Anor* [1996] 2 CLJ 328 (Jawan's case), where the High Court condoned the filing of a fax copy of a petition of appeal. The appellant also contended that the court had the discretion to condone a delay in the filing of the notice of appeal.

Held, dismissing the appeal:

(1) The preliminary objection related to the delay in the filing of the notice of appeal and not the petition of appeal and in consequence Jawan's case was not relevant. In respect of notices of appeal, s 307 of the Criminal Procedure Code ('CPC') clearly states that the notice of appeal should be filed within 14 days from the date of the decision. Nevertheless, s 56 of the Courts of Judicature Act 1964 ('CJA') and s 310 of the CPC give the court some discretion to condone delay, in order that substantial justice could be done in the matter. However, although these two sections were applicable to notices as well as petitions of appeal, decided cases had shown that the courts were more liberal in condoning an application to file a petition out of time rather than a notice of appeal. Section 307 of

the CPC read together with the strict requirements of s 51 of the CJA, required the notice to be filed within 14 days of the decision appealed against. There was no room to say that a fax copy of the notice of appeal would suffice to satisfy the requirements of s 51 of the CJA (see paras 5–7).

(2) Further, the appellant ought to also comply with the Rules of the Court of Appeal 1994 ('the RCA'). Rules 58 to 64 of the RCA do not make any provision for notices of appeal to be filed by fax (see paras 8 & 11).

(3) Further, the discretion given to the courts to condone a delay in the filing of the notice of appeal, should not be exercised or ought to be exercised sparingly when it related to notices of appeal by the public prosecutor as opposed to those filed by the accused. Section 307 of the CPC and s 51 of the CJA were the law, whereas s 56 of the CJA was a discretion that could not be exercised to defeat art 5(1) of the Federal Constitution, which was a constitutional provision that guaranteed a person's personal liberty. In consequence, the discretion should not be exercised against the accused when the law required the prosecution to file the notice of appeal within 14 days. In the present case, the notice of appeal was not filed according to the law and no application was filed to condone the delay (see paras 12–15).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang diberikan pada 20 April 2012. Responden membangkitkan bantahan awalan bahawa notis rayuan tidak difailkan dalam masa yang ditentukan. Notis rayuan, yang patut difailkan pada 3 Mei 2012, hanya difailkan pada 9 Mei 2012. Responden juga membuat bantahan kepada fakta tidak terdapat permohonan untuk memberikan kelonggaran kepada kelewatan, apabila rayuan betul dibangkitkan untuk pendengaran. Selanjutnya, responden juga berhujah bahawa kelewatan tidak boleh diberikan kelonggaran pada hari pendengaran. Dalam menjawab, timbalan pendakwa raya ('perayu') berhujah bahawa ia tidak memfailkan notis rayuan lewat dan bahawa mahkamah telah menerima salinan faks notis rayuan pada 2 Mei 2012. Dalam menyokong hujahan ini perayu bergantung ke atas kes *Public Prosecutor v Jawan ak Empaling & Anor* [1996] 2 CLJ 328 (Jawan's case), di mana Mahkamah Tinggi memberi kelonggaran kepada pemfailan petisyen rayuan. Perayu juga berhujah bahawa mahkamah mempunyai budi bicara untu memberikan kelonggaran kepada kelewatan memfailkan notis rayuan.

Diputuskan, menolak rayuan:

(1) Bantahan awalan berkaitan kepada kelewatan dalam memfailkan notis rayuan dan bukan petisyen rayuan dan akibatnya kes *Jawan* tidak relevan. Berkaitan notis-notis, s 307 of the Kanun Tatacara Jenayah ('KTJ') jelas

menyatakan bahawa notis rayuan patut difailkan dalam masa 14 hari dari tarikh keputusan. Walau bagaimanapun, s 56 Akta Kehakiman Mahkamah 1964 ('AMK') dan s 310 KTJ memberikan mahkamah budi bicara untuk memberikan kelonggaran kepada kelewatan, supaya kehakiman substansial boleh dijalankan. Walau bagaimanapun, kedua-dua seksyen ini digunapakai kepada notis-notis dan juga petisyen rayuan, kes-kes yang diputuskan telah menunjukkan bahawa mahkamah adalah lebih liberal dalam memberikan kelonggaran permohonan untuk memfailkan petisyen di luar masa daripada notis rayuan. Seksyen 307 KTJ dibaca bersama dengan kehendak tegas s 51 AMK, memerlukan notis difailkan dalam masa 14 hari daripada keputusan yang dirayukan. Tiada ruang untuk menyatakan salinan faks notis rayuan mencukupi untuk mematuhi kehendak s 51 AMK (lihat perenggan 5–7).

(2) Selanjutnya, perayu patut juga mematuhi dengan Kaedah-Kaedah Mahkamah Rayuan 1994 ('KMR'). Kaedah 58 sehingga 64 KMR tidak membuat apa-apa peruntukan untuk notis-notis rayuan difailkan dengan faks (lihat perenggan 8 & 11).

(3) Selanjutnya, budi bicara yang diberikan kepada mahkamah untuk memberikan kelonggaran kepada kelewatan dalam memfailkan notis rayuan, tidak patut dilaksanakan atau patut dilaksanakan secara teliti apabila ia berkaitan notis-notis rayuan oleh pihak pendakwa raya sebagai bertentangan kepada yang difailkan oleh tertuduh. Seksyen 307 KTJ dan s 51 AMK adalah undang-undang, di mana s 56 AMK adalah budi bicara yang tidak boleh dilaksanakan untuk menentang perkara 5(1) Perlembagaan Persekutuan, yang mana adalah peruntukan berperlembagaan yang menjamin kebebasan peribadi seseorang. Akibatnya, budi bicara tidak boleh dilaksanakan terhadap tertuduh apabila undang-undang memerlukan pihak pendakwaan untuk memfailkan notis rayuan dalam masa 14 hari. Dalam kes ini, notis rayuan tidak difailkan mengikut undang-undang dan tiada permohonan difailkan untuk memberi kelonggaran kepada kelewatan (lihat perenggan 12–15).]

Notes

For a case on notice of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 1571.

Cases referred to

Chin Kek Shen v PP [2013] 5 MLJ 827, CA (refd)
Goi Ching Ang v PP [1999] 1 MLJ 507, FC (refd)
Muhamad Asri bin Bakar v PP [1996] MLJU 261; [1996] 1 LNS 496, HC (refd)
PP v Jawan ak Empaling & Anor [1996] 2 CLJ 328, HC (refd)
Veerasingham v PP [1958] 1 MLJ 76, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 51, 56, 56A
Criminal Procedure Code ss 307, 307(9), 310
Federal Constitution art 5(1)
Indian Constitution [IND] art 21
Rules of the Court of Appeal 1994 rr 58, 59, 60, 61, 62, 63, 64

Appeal from: Suit No MTJ (1) 42S-82 of 2011 (High Court, Johor Bahru)

Anselm Charles Fernandis (Attorney General's Chambers) for the appellant.
Noor Din bin Hussin (Tia & Noordin) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] This is our judgment in respect of the respondent's preliminary objection that (a) the notice of appeal was not filed within time; (b) there was no application to condone delay; (c) the delay could not be condoned on the day of hearing. My learned brothers, Mohamed Apandi Hj Ali JCA and Linton Albert JCA have read the judgment and approved the same.

BRIEF FACTS

[2] In the instant case the public prosecutor is appealing against the decision of the High Court delivered on 20 April 2012. It is not in dispute that the notice of appeal was only filed on 9 May 2012, when it ought to have been filed on or before 3 May 2012. The appeal proper came up for hearing on 25 March 2013 and there was no application to condone delay. The learned deputy public prosecutor on this issue submits as follows:

(a) the appellant has faxed the notice of appeal on 2 May 2012 and the notice of appeal was received by the registrar on 9 May 2012. And argues that the appellant was not late in filing the notice of appeal because the court had received the fax copy on 2 May 2012;

(b) the appellant relies on the case of *Public Prosecutor v Jawan ak Empaling & Anor* [1996] 2 CLJ 328, where the High Court condoned the filing of a fax copy of a petition of appeal (not notice of appeal). The court, inter alia, held:

> [3] Section 307 of the CPC does not provide specifically that only the original copy of the petition of appeal ought to be lodged. The section, being a procedural law, is open to a liberal construction and so, it may extend to include a copy other than the original copy.
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> [4] A copy of a document in whatever form in most cases has been accepted and widely used as documentary evidence in court in cases where the original is

not readily available. An illustration to s 3 of the Evidence Act 1950, in addition, states that a photographic or other visual recording including a recording of a photographic or other visual transmission over a distance, is a document. In the light of these, a fax copy of the petition of appeal here cannot be said to be an unlawful document. Clearly, such a document is a document within the meaning of s 3 of the Evidence Act.

[5] It is untenable to contend that a fax copy is not an original or primary document within the meaning of s 63 of the Evidence Act 1950. Section 63 of the Act mainly concerns with evidence, the proof of a fact by means of a documentary evidence, either primary or secondary. In the instant case, there was no dispute as to the content of the said documents. In any case, the appeal here, having been accepted by the registrar, must be deemed to have been properly filed. On the facts, there is no reason for the court to intervene in the registrar's exercise of his discretion in accepting the appeal in the form it was presented to the court.

[3] It must be noted that paras (4)–(5) of the decision above is an erroneous proposition of law which has no application to filing of petition of appeal as provided by s 307(9) of the Criminal Procedure Code ('CPC') which requires the petition of appeal to be lodged and not just faxed or emailed etc. The said section reads as follows:

(9) If a petition of appeal is not lodged within the time prescribed by this section the appeal shall be deemed to have been withdrawn and the trial Court shall enforce its sentence or order if any stay of execution has been granted, but nothing herein contained shall be deemed to limit or restrict the powers conferred upon a Judge by section 310.

[4] Basically it is a simple procedure and had been followed for decades and to say that petition of appeal can be filed by way of fax will have no jurisprudential justification save in cases where a fax copy is sent within time and having lodged the petition of appeal out of time the appellant files an application immediately to condone the delay in filing the petition of appeal, and provide reasons for the court to condone delay in lodging the appeal. In *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507 the Federal Court stated that any departure from the entrenched judicial interpretation laid down in the long line of decisions should be left to the Legislature (see *Chin Kek Shen v Public Prosecutor* [2013] 5 MLJ 827) Cri A No B-05–83/03 of 2012 (5 April 2013).

[5] The preliminary objection is related to delay in filing of notice of appeal and not petition of appeal and in consequence the above case is not relevant. When it relates to notice of appeal, s 307 of the CPC states that the notice of appeal must be filed within 14 days from the date of decision. Section 56 of the Courts of Judicature Act 1964 ('CJA 1964') and s 310 of the CPC give some

discretion to the court to condone delay, in order that substantial justice may be done in the matter. The said section reads as follows:

> S56 CJA 1964 — The Court of Appeal may in its discretion, on the application of any person desirous of appealing who may be debarred from so doing by reason of his not having observed some formality or some requirement of this Act, permit an appeal upon such terms and with such directions as it may consider desirable in order that substantial justice may be done in the matter, and may, for the purpose, enlarge any period of time prescribed by section 51 or 53.
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> S310 CPC — A Judge may, on the application of any person desirous of appealing who may be debarred from so doing upon the ground of his not having observed some formality or some requirement of this Code, permit an appeal upon such terms and with such directions to the Magistrate and to the parties as the Judge shall consider desirable, in order that substantial justice may be done in the matter.

[6] The above two sections are applicable to notice of appeal as well as petition of appeal. From decided cases courts are liberal in condoning application to file out of time the petition of appeal and not notice of appeal, (see *Veerasingham v Public Prosecutor* [1958] 1 MLJ 76; *Muhamad Asri bin Bakar v Public Prosecutor* [1996] MLJU 261; [1996] 1 LNS 496).

[7] Section 307 of the CPC relating to filing of notice of appeal must be read with s 51 of the CJA 1964. And the strict requirements of s 51 of the CJA 1964 must be complied with to sustain the appeal. There is no room to say a fax copy of notice of appeal will suffice to satisfy the requirement of s 51. The said section reads as follows:

> (1) Every appeal shall be by notice in writing which shall be filed with the Registrar of the Court from which the appeal lies at the place where the decision appealed against was given within fourteen days after the date of the decision.
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> (2) Every notice of appeal shall state shortly the substance of the judgment appealed against, shall contain an address at which any notices or documents connected with the appeal may be served upon the appellant or upon his advocate, and, except where the notice of appeal is given orally under section 54, shall be signed by the appellant or his advocate:
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> Provided that, in a case of an appeal under subsection 50(2), the computation of the aforesaid period of fourteen days shall commence from the date immediately after leave has been granted by the Court of Appeal.

[8] One must not assume that s 307 of the CPC and/or s 51 of the CJA only deals with notice of appeal. The appellant must also comply with the Rules of the Court of Appeal 1994 ('RCA 1994'), and if it is an appeal by the prosecutor, it also permits the prosecutor to make an application immediately to seek a warrant of arrest and/or seek bail. Such steps must be taken immediately to

preserve the integrity of the appeal process and to make sure the accused after having been acquitted by the trial court is made subject to the control of the appellate court until the appeal procedure is exhausted. Section 56A of the CJA 1964 specifically says:

> Where an appeal is presented against an acquittal, the Court of Appeal may issue a warrant directing that the accused be arrested and brought before it and may remand him to prison pending the disposal of the appeal or admit him to bail.

[9] It is our general observation that the attorney general chambers does not promptly make the necessary application to seek warrant of arrest and/or bail and in consequence many of the appeals filed by the public prosecutor at the end of the day is struck out for the reason that the respondent/accused could not be located.

[10] Rules 58–64 of the RCA 1994 deals with notice of appeal. And r 58 states:

> (1) Within fourteen days of the decision of the High Court or within such extended time as the Court may allow the appellant shall file in the Registry of the High Court at the place where the decision appealed against was given a Notice of Appeal and eight copies thereof. A copy of the Notice of Appeal shall be sent by the appellant to the Registrar of the Court of Appeal.
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> (2) The Notice of Appeal shall be substantially in Form 5 in the First Schedule.
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> (3) As soon as Notice of Appeal is filed by the Public Prosecutor as in subrule (1), the Court of Appeal may on an application by the Public Prosecutor issue a warrant directing that the accused be arrested and brought before it and may remand him to prison pending the disposal of the appeal or admit him to bail in accordance with the provisions of section 56A of the Courts of Judicature Act 1964 [Act 91].
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> (4) The application under subrule (3) may be made by motion ex parte and for the purpose of this subrule, rules 71 and 72 shall apply.

[11] It must also be noted that rr 58–64 do not make any provision for notice of appeal to be filed by fax.

[12] We agree with the learned deputy public prosecutor that the court has discretion to condone delay in filing of notice of appeal. However, in our view the discretion should not be exercised and/or sparingly exercised when it relates to notice of appeal by the public prosecutor *as opposed to the accused* and the discretion to condone delay in respect of petition of appeal must be readily

given unless it will result in miscarriage of justice. (Emphasis added.) Our reasons, inter alia, are as follows: A

(a) at common law the prosecution could not easily maintain a criminal appeal against the decision of the jury on all issues, more so on finding of facts; B

(b) art 5(1) of the Federal Constitution gives special protection to the accused. The article reads as follows:

> No person shall be deprived of his life or personal liberty save in accordance with law. C

(c) s 307 of the CPC as well as s 51 of the CJA 1964 requires the notice to be filed within 14 days. That is the law and s 56 only relates to discretion and in the light of art 5(1) it is doubtful whether discretion can be exercised to defeat the constitutional provision. We are of the view that such discretion should not be exercised to the detriment of the accused/respondent. D

[13] The Indian equivalent of art 5(1) is art 21 of the Indian Constitution. In India the fundamental guarantee provision for protection of life and personal liberty has a rider, that is to say 'except according to procedure established by law'. The said Indian article reads as follows: E

> No person shall be deprived of his life or personal property except according to procedure established by law. F

[14] Article 5(1) has no such rider and in our considered view the procedure by way of discretion of court to extend time to file notice of appeal against the accused cannot be sustained in light of art 5(1) of the Federal Constitution. Law in our Constitution and Procedure in the Indian Constitution cannot be treated as synonymous, when exercising discretion. Law reflects element of certainty and procedure paves way for flexibility, discretion and judicial arbitrariness. In consequence it is our considered view that discretion should not be exercised against the accused when the law is that the prosecution must file the notice of appeal within 14 days. G H

[15] In the instant case notice of appeal was not filed according to the law and no application was filed to condone delay. On such facts we have no hesitation in dismissing the appeal in limine. In consequence the appeal is dismissed. I

[16] We hereby order so.

Appeal dismissed.

Reported by Kohila Nesan